In deciding whether it will do so the Court of Appeal will enquire into the reasons for delay in failing to appeal before and may take into consideration the *prima facie* merits of the grounds of appeal. It has been held in *In re Brooke David deceased,*[1] that such an application requires no affidavit of merits, and clearly, if the above procedure has been followed, the Court knows that the *prima facie* merits have been considered and that what remains is the question of the reasons for delay.

In the case under consideration no memorandum of appeal was filed with application to bring an appeal *in forma pauperis* and there is nothing to show that the *prima facie* merits of the grounds of appeal were considered. Applicant was found to be a pauper but was not given leave to appeal as such but was given leave to apply for enlargement of time as a pauper. I am of opinion that this order was incorrect and that the proper order, if the evidence warranted it would have been for leave to appeal *in forma pauperis* leaving it to him to take the necessary steps of which this was one to lodge his appeal.

As there is nothing to show that the *prima facie* merits have been previously considered it is for this Court, as far as it can from the record to consider them and the reasons for delay in filing this application for enlargement of time for leave to appeal.

On both grounds applicant fails to show sufficient ground. As to the merits he says he is not satisfied on many grounds, but does not name them and goes on to say that his counsel Mr. Fung has not prosecuted his appeal. No explanation is given as to why after 30th. April, 1938 he waited till 7th. November, 1939 to move the Court for leave to appeal out of time. The Court has examined the files of the original case and read the judgment of Mills J. therein and also examined the original notice of appeal and the O.S. 105/37, and the petitions of applicant. These disclose no grounds for giving leave to appeal. Applicant had the advantage of counsel in the lower Court and on the issue of the notice of appeal and the withdrawing of same and the proceedings in O.S. 105/37 and it must be assumed that the ground for the withdrawal of the appeal was for lack of merits. There is no evidence at all of any reason for delay in applying to appeal *in forma pauperis* and it is difficult to believe that applicant who had 3 times engaged counsel was too ignorant to make enquiries at the Court. If there is evidence not available at the trial applicant should apply for revision. I therefore dismiss the motion to enlarge the time for bringing the appeal.

Application dismissed.

[ORIGINAL CIVIL JURISDICTION]

LAVILLE, J.

January 3, 1940.

KATIJAH BINTI ABDULLAH

vs.

LEE LEONG TOH & ANOTHER.

[JOHORE BAHRU CIVIL SUIT No. 7 of 1939]

Negligence—Road Accident—Motor Vehicles in collision—Defence of contributory negligence.

The plaintiff who was a passenger in a motor bus sustained an injury to her right arm in a collision between the bus and another vehicle. At the time of the collision her elbow was resting on a window frame and projecting through the open window. The defendant who was sued as the employer of the driver of the other vehicle denied negligence and set up, as a further ground of defence, contributory negligence on the part of the plaintiff.

Held, that a passenger who owes no duty to the driver of an oncoming vehicle, and who is seated in a normal manner and not infringing any prohibition or disregarding any warning, cannot be guilty of contributory negligence.

Simon v. The London General Omnibus Coy.[2] distinguished.

Cases referred to:—

(1) *Hare v. The London General Omnibus Co.*, 23 L.T.R. 616.

(2) *Simon v. The London General Omnibus Co.*, (1907) 23 T.L.R. 463.

TRIAL OF ACTION.

The relevant facts and arguments appear from the parts of the Judgment set out below.

Mark Morrison for plaintiff.

Hatchard for defendants.

Cur. Adv. Vult.

Laville, J.—The plaintiff Katijah binti Abdullah claims $5,000/- general damages from Lee Leong Toh and Ng Nai Jin owners of a motor lorry No. S. 2731, for injuries to her right forearm and elbow which led to the amputation of the arm above the elbow and which were caused by the negligent driving of defendants' driver one Tan Thong on 9th. December, 1938 at or about the 49½th. mile Johore Bahru—Ayer Itam Road about 4 p.m. in that he caused his lorry S. 2731 to collide with a motor bus M. 161 in the rear right seat of which plaintiff was sitting with her right elbow and forearm resting upon the window frame thereof and the impact of some part of defendants' lorry on her arm and elbow caused the above injuries.

The acts of neligence alleged are

(1) excessive speed of the lorry when passing M. 161

(2) driving the lorry at time of impact on the incorrect side of the road and

(3) not keeping at a safe distance from the bus M. 161 when passing it.

The defendants in their filed defence denied that the lorry was driven by their servant, and if it was, that it was driven carelessly or negligently and alternatively claim that the plaintiff was guilty of contributory negligence by resting her arm and elbow on the window frame of M. 161 so as to cause them to project, and deny that the plaintiff suffered any injury or damage.

In court the defendants admitted that the lorry S. 2731 was driven at the date and time in question by their servant Tan Thong in the course and scope of his duties.

The plaintiff gave evidence that as she was seated in the right rear seat of M. 161 which ran along the body of the bus with her right arm resting on the window sill the defendants' lorry S. 2731 passed going in the opposite direction towards Johore Bahru: she was just aware that a lorry was passing but was not looking at it but inwards when she felt an impact on her arm and cried out: her bus M. 161 stopped and she discovered that her arm had been practically torn off and was hanging by skin: it was amputated the same day at Kluang hospital. Her evidence is borne out by the driver of the bus and by her husband who was a passenger and one Mat Aroff the manager of a troupe of artistes with whom she was travelling.

The defendants' witnesses the driver of S. 2731, and a clerk who was travelling with him admit in evidence that as they passed M. 161 at the time and place stated by plaintiff they heard a 'tok' at the rear of their lorry on its right side: the attendant in the rear of their lorry told them to stop and on examining their lorry a piece of bone was found in the rear part of the body and what looked like crushed flesh on the side and that when they were boarded by plaintiff's husband he asked the driver of the lorry why he had been so careless as to cause an arm of a passenger in the bus to be broken.

It is abundantly clear therefore and was never seriously contested that the plaintiff's injuries were caused by the impact of the lorry on her arm on the day and at time and place named by the plaintiff and I find to that effect. As to the extent of the injuries the amputation of the arm is self-evident.

The defendants however allege, that if there was negligence on their part, there was contributory negligence on the part of the plaintiff in that she was protruding her elbow and some of her arm out of the window of the bus and that the decisive cause of the injury was her negligence in doing so, and that she had the last chance of averting the accident by removing her arm.

As to the rule that a plaintiff cannot recover damages if in spite of defendants' negligence, it was possible for him to avert the consequences of defendants' negligence and he fails to do so, this can only apply if the plaintiff is conscious or ought to be conscious that injury is imminent. It is clear in this case that there was no duty owed by plaintiff as she sat in the bus to defendants' driver to watch the approach of his lorry and its course as it passed. Her evidence is that she glanced at the lorry when it was about 40 yards away and at the moment of impact was not looking at the lorry but towards the left side of the bus in which she sat. It was argued by counsel for the defence that at the combined speed at which both vehicles were travelling the lapse of time between her view of the lorry and impact was 1½ seconds, and that in that time she could not have looked away and should therefore have removed her arm. I cannot agree with this contention: the turn of a glance from one object to another is a matter of far less than a second. There is no evidence to contradict her as to where she was looking and her story is compatible with the position in which she sat and I accept it as a fact that she was not looking at the oncoming lorry and owed no duty to any one to do so or to expect that the lorry would collide with the bus and had therefore no opportunity to avert the consequences of the collision.

There remains however the question as to whether her method of sitting was itself negligent and the decisive cause of the accident. It seems clear that had her arm not been where it was she would have suffered no injury and that the only result of the collision would have been a scrape on the window frame of the bus.

The Traction Engines and Motor Cars Enactment No. 12 by Section 12 (iv) thereof makes it an offence for any person to ride on a motor car otherwise than inside the same while it is being driven on a public thoroughfare: and rule 75 made under the above cited Enactment prohibits any person from travelling on any motor vehicle otherwise than inside the body. It is pertinent to enquire whether these provisions are aimed at the protrusion of any part whatever of a person beyond the body of a car in which he is travelling. In my view such a construction is incorrect: the

normal reading of the injunction in each case is that no person shall take up a position for travelling in a car otherwise than inside the body thereof and the object is to prevent persons travelling on the footboard or luggage carrier or in any such manner and the words "otherwise than inside the body" or "otherwise than inside the same" are not applicable to a hand or arm projected over the side while the person is seated normally in the car.

The true test appears to be whether to travel in a bus with the arm resting on the window frame and the elbow and forearm projecting slightly over it is a normal and reasonable method of sitting and using the bus. There appear to be no cases in which this matter has been decided.

I have been referred to *Simon v. The London General Omnibus Coy.*[2] as authority for the contention that to sit in such a manner is negligent. In that case plaintiff sued defendants for damages for injury caused to his elbow as he sat on plaintiff's bus with his elbow resting on the brass rail of the bus and projecting slightly beyond it. He was non-suited in the case on the ground that there was no evidence of negligence by defendants driver and no evidence that the accident would have happened if plaintiff's arm had been within the limits of the omnibus. In *Bevan* on Negligence IVth. Edition pages 695 & 1141 this case is cited with the comments of the author as follows:—

> "The Divisional Court upheld a non-suit, holding that there was no evidence of negligence on the driver's part in going close to the kerb, and no evidence that the accident would have happened had the plaintiff been riding **reasonably** with his arm within the limits of the vehicle he was on."

At page 1141 referring in the notes to the same case the learned author comments...."the plaintiff was injured by being struck on the arm which was projecting over the side of the omnibus, by a finger post which admittedly would not have struck him if his arm had been, as it ought to have been, inside the rail of the omnibus." At page 1195 the author draws the conclusion that so to sit amounts to contributory negligence.

With all respect I cannot agree with the learned author. The report of the case in the T.L.R. makes it clear that neither the Shoreditch County Court Judge nor the Divisional Court held that it was not proper to sit with the arm in such a position. The plaintiff was non-suited because whoseever the negligence, if any, it was not defendant's and there was no case for them to meet. *Hare v. The London General Omnibus Coy.*[1] was decided on a similar ground.

In my view sitting in the position adopted by plaintiff in this suit is one that is *prima facie* a neutral act. Most buses are so built that the window sill provides a natural rest for the arm and invites its use as such and it is a fact of which I sitting as a jury take cognisance of, that it is a common practice so to sit: in the face of a common practice and no statutory prohibition or actual warning against such an act I hold that it cannot be held as anything but reasonable, and in the circumstances does not show negligence. The plaintiff sitting in an ordinary manner in the bus proceeding properly on its own side of the road with no expectation of or reason to expect contact with another vehicle and no duty to keep a good look out cannot be held to have owed a duty to the driver of an oncoming vehicle not to sit in this manner.

I hold therefore that there was no contributory negligence by the plaintiff. Even if I were prepared to hold there was such negligence in my view it would not avail the defendants' case because it is clear that the last opportunity to avert danger lay with defendants' driver who by reducing speed on approaching the bus could have so reduced the sway of his vehicle as to render it innocuous.

As to damages claimed by the plaintiff, I take into account the fact that her special aptitude for bangsawan work has been destroyed: it is obvious that the lack of an arm would reduce her value as a dancer and singer of the type she was to nothing. In addition she has suffered the loss of a right arm and considerable shock and pain and disfigurement: she is incapacitated as a wife from working and even clothing herself with any comfort and her loss is one that will go with her to her grave. While it is impossible to make good the loss of her arm it is I think reasonable to assume that she should be put into a position where she would not in case of her husband's death or divorce be plunged into complete poverty more hampered to meet it than most of her sisters and should be recompensed for the pain and shock she has endured and the awkwardness and discomfort she will have to endure for the rest of her life. In my estimation the sum of $2,000 properly invested would ensure this and would not be a sum which the defendants should not be called upon to pay.

I give judgment therefore for plaintiff for $2,000 and the costs of this suit.

Judgment accordingly.